PD-0388-19
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 10/25/2019 2:40 PM
Accepted 10/25/2019 2:45 PM
DEANA WILLIAMSON
CLERK

**No. PD-0388-19**

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
10/25/2019
DEANA WILLIAMSON, CLERK

**CHASE ERICK WHEELER,**

***APPELLANT***

**V.**

**THE STATE OF TEXAS,**

***APPELLEE***

*From the Court of Appeals for the Second District of Texas*
*No. 02-18-00197-CR*
*Appeal from Cause No. 1473192 in County Criminal Court No. 3 of Tarrant County, Texas, the Hon. Bob McCoy Presiding*

# STATE'S BRIEF ON THE MERITS

SHAREN WILSON
TARRANT COUNTY CRIMINAL DISTRICT ATTORNEY

JOSEPH W. SPENCE
Assistant Criminal District Attorney
Chief, Post-Conviction

SHELBY J. WHITE
Assistant Criminal District Attorney
Tim Curry Criminal Justice Center
401 W. Belknap
Fort Worth, Texas 76196-0201
(817) 884-1687
FAX (817) 884-1672
State Bar No. 24084086
COAappellatealerts@tarrantcountytx.gov

BRYCE BUCHMANN
Assistant Criminal District Attorney

## IDENTITY OF PARTIES AND COUNSEL

Pursuant to Tex. R. App. P. 70.3 and 38.1, the following is a complete list of all parties to the trial court's judgment, and the names and addresses of all trial and appellate counsel:

1. The parties to the trial court's judgment are the State of Texas and Chase Erick Wheeler, the defendant.

2. Stephanie Gonzales, attorney of record for the Appellant at trial and on appeal, P.O. Box 121728, Arlington, Texas 76102.

2. J. Daniel Clark, attorney on appeal for the Appellant, 550 Reserve Street, Suite 190, Southlake, Texas 76092.

3. Sharen Wilson, Criminal District Attorney, attorney for the State of Texas, her assistant at trial, Bryce Buchmann, and her assistants on appeal, Joseph W. Spence and Shelby J. White, 401 W. Belknap, Fort Worth, Texas, 76196-0201.

## TABLE OF CONTENTS

## INDEX OF AUTHORITIES

**Cases**

**Statutes**

## STATEMENT OF THE CASE

Appellant Wheeler was charged with driving while intoxicated. Wheeler refused to submit to field sobriety tests or a blood draw. Thus, the arresting officer filled out and submitted an affidavit for a blood draw warrant. The blood draw revealed that Wheeler had a blood alcohol concentration of 0.14. Wheeler moved to suppress the blood evidence because the officer failed to properly swear an oath in his affidavit for the blood draw warrant. The trial court denied Wheeler's motion, holding that the good faith exception applied, and Wheeler pleaded guilty. The Fort Worth Court of Appeals reversed the trial court's ruling, holding that the officer's affidavit was unsworn and that the officer could not have acted in objective good faith by submitting an unsworn affidavit for a search warrant.

The court of appeals issued its published opinion on March 21, 2019. *Wheeler v. State*, 573 S.W.3d 437 (Tex. App.—Fort Worth 2019, pet. granted). [App. A]. The State did not file a motion for rehearing or reconsideration. This Court granted the State's petition for discretionary review on Ground No. 2 on September 25, 2019. Oral argument was denied.

## ISSUE PRESENTED

1. Can an officer act in objective good faith by relying on the magistrate's approval of a warrant that is defective in form?

## STATEMENT OF FACTS

The factual allegations of this case are not in dispute. Officer Tyler Bonner was the sole police officer on the night shift in Pantego, Texas. [RR 2:7, 10-11, 60-61]. Pantego, Texas, is a small one-square-mile town completely enveloped by Arlington, Texas, and usually only staffs one officer on the night shift. [RR 2:11]. On July 9, 2016, at around 3:00 a.m., Officer Bonner arrested Appellant Chase Erick Wheeler on suspicion of driving while intoxicated. [CR 4, 6]. Wheeler refused to submit to any field sobriety tests and also refused to submit a blood or breath sample. [RR 3:10-13]. Officer Bonner arrested Wheeler and took him to the Pantego police station, where he filled out an affidavit for a search warrant for a blood draw. [RR 2:7-8].

Officer Bonner used a pre-printed affidavit form kept by the Pantego Police Department. [RR 2:8; RR 3:State's Ex. 5, App. B]. The affidavit in the packet contained a jurat with a signature blank for the officer's signature as affiant, and another signature blank below it labeled "Judge/Peace Officer/Notary." [RR 3:State's Ex. 5, App. B]. This affidavit is State's Exhibit 5 and contains the following:

WHEREFORE, based upon this affidavit and Beeman v. State, 86 S.W.3d 613 (Tex. Crim. App. 2002), Affiant asks for a search warrant that will authorize Affiant or Affiant's agent to search the person of the suspect for the blood evidence described above and seize the same as evidence that the offense described was committed and that the suspect committed the said offense.

Further Affiant asks for issuance of an order to appropriate third parties directing them to assist Affiant in the execution of said warrant.

Affiant

Subscribed and sworn to before me on this 9 day of July, 2016, by an official authorized to administer and authorize this oath pursuant to TEX. GOV'T CODE §602.002.

Judge / Peace Officer / Notary

ASSOCIATE JUDGE SARA JANE DEL CARMEN

Official's Printed Name & Title

[ RR 3:State's Ex. 5, App. B]. Officer Bonner signed the signature blank for the affiant's signature, but did not swear to it in front of anyone. [RR 2:18-19, 22-23; RR 3:State's Ex. 5, App. B]. The dispatcher then scanned the packet and uploaded it to a Dropbox account where it was electronically received by the magistrate, Sara Jane Del Carmen. [RR 2:12-13]. Judge Del Carmen reviewed the form, determined that there was probable cause to issue the warrant, and signed the signature blank labeled "Judge/Peace Officer/Notary." [RR 2:38-39, 52-53; RR 3:State's Ex. 5, App. B]. On the form affidavit, above Judge Del Carmen's signature, appears a jurat that states that Officer Bonner swore to and signed the affidavit in front of Judge Del Carmen. But that is not what occurred.

Officer Bonner testified at the suppression hearing that he did not know that

he needed to swear to a search warrant affidavit in front of anyone, and that he believed he was following standard Pantego Police Department protocol when he signed the form and had it sent to the magistrate via Dropbox. [RR 2:19-20]. Judge Del Carmen testified at the hearing that she did not notice that the form only had one signature blank (i.e., the signature line for the "Affiant"), and that usually affidavits she received from Pantego police officers were sworn to by another officer or notary before being sent to her. [RR 2:53]. However, the form did not have a signature blank for another person to accept the oath. [RR 3:State's Ex. 5, App. B]. Instead, Judge Del Carmen signed as if Officer Bonner's oath had been made in front of her. [RR 2:67-68]. At the suppression hearing, she admitted that she was mistaken in signing the jurat. [RR 2:67-68].

It is undisputed that Officer Bonner did not swear to the affidavit in front of Judge Del Carmen or anyone else. [RR 2:18-19]. The trial court ruled that even though the affidavit was unsworn, the good faith exception applied. [CR 27-30]. On appeal, Wheeler argued that the good faith exception could not excuse an unsworn affidavit because a sworn affidavit was a constitutional requirement. The Fort Worth Court of Appeals held that (1) there is no evidence that the affidavit was supported by any oath or its equivalent, and (2) the officer could not have acted in objective good faith in relying on an affidavit he knew to be unsworn.

## SUMMARY OF THE ARGUMENT

The good faith exception is meant to cover the gap between the perfect warrant and the "false" warrant, i.e., a warrant obtained by false statements or illegal police conduct. In this gap lies the so-called "technical" defects or defects of form. These defects cannot be deterred by exclusion because they are the result of simple human error, not bad faith or ill-intent. But, the Fort Worth Court crafted a results-oriented opinion invalidating a warrant due to an officer's good faith mistake because it believed the mistake was simply too big to be excused. To do so, the Fort Worth Court applied *McClintock's* "line of validity" standard, which deals with an officer's illegal conduct in obtaining a warrant, not to an officer's unknowing mistake of form on a warrant. Moreover, the Fort Worth Court required the officer to both know he made a mistake, and to question the magistrate's approval of his mistake. This flips the officer-magistrate relationship on its head, and ultimately creates a rule that cannot be applied with practicality.

The good faith exception should apply when an officer acts in good faith, even if the mistake results in a constitutionally defective warrant. The question for the application of the good faith exception is not the magnitude of the error, but whether the error was actually in good faith. Because there is no dispute in this case that the facts establishing probable cause in the affidavit were truthful and that the warrant was issued by a neutral magistrate, the good faith exception should apply.

## ARGUMENT AND AUTHORITIES

### I. Introduction and Standard of Review.

The good faith exception applies the "objectively reasonable officer" test. *McClintock v. State*, 541 S.W.3d 63, 67 (Tex. Crim. App. 2017). This means that in determining whether the good faith exception applies, the trial court looks to what an objectively reasonable officer would have done, standing in the shoes of the officer in the case at hand. This Court granted review to answer the question of whether an objectively reasonable officer can rely on the magistrate's approval of a defective warrant. Subsumed within that issue is the question of whether the magnitude of a good faith error can subvert the application of the good faith exception.

A trial court's ruling on a pretrial motion to suppress evidence is reviewed for an abuse of discretion. *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006). Great deference is given to the trial court's determination of historical facts, while the application of the law to the facts is reviewed de novo. *Torres v. State*, 182 S.W.3d 899, 902 (Tex. Crim. App. 2005).

### II. The Good Faith Exception Should Apply to a Warrant's Defects in Form.

This case involves what are admittedly bad facts: a police officer did not know that he was required to sign a sworn affidavit to obtain a search warrant against the defendant, and admitted that during his tenure at the Pantego police department, he

had not signed a sworn affidavit for any other warrant in the past. In determining that the officer could not rely on the good faith exception, the Fort Worth Court of Appeals held that *no reasonable officer* could believe that he was not required to swear an affidavit in obtaining a search warrant.

For the good faith exception to apply, there must be objective good faith reliance upon a warrant issued by a neutral magistrate that is based upon probable cause. *McClintock*, 541 S.W.3d at 67; Tex. Code Crim. Proc. art. 38.23(b). Here, it is uncontested that the warrant was issued by a neutral magistrate and supported by probable cause. [RR 2:20, 68-69; *see also* App. A, Op. at 16]. However, the Fort Worth Court believed that the good-faith mistake in this case was simply too big to be excused. This resulted in an opinion that uses bad facts to create bad law.

### A. The Fort Worth Court of Appeals misapplied *McClintock*.

"It is plain enough from the language of Article 38.23(b) that, before its good-faith exception to Subsection (a)'s exclusionary rule may apply, there must be (1) objective good-faith reliance upon (2) a warrant (3) issued by a neutral magistrate that is (4) based upon probable cause." *McClintock*, 541 S.W.3d at 67. The Fort Worth Court of Appeals held that the good faith exception did not apply to the search warrant obtained by Officer Bonner because "[n]o objectively reasonable officer could believe that sworn affidavits are not required in seeking search warrants." [App. A, Op. at 18]. In other words, the Fort Worth Court concluded that no officer

could make an error of such magnitude without acting in bad faith. Relying on this erroneous conclusion, the Fort Worth Court misapplied the good faith exception by wrongly utilizing *McClintock's* "close enough to the line of validity" rule to an officer's technical errors in applying for a warrant.

The good faith exception is meant to apply when there is a facially valid warrant unless (1) the warrant was not based on probable cause, or (2) the underlying facts supporting the affidavit are false, i.e., the officer lied in obtaining the warrant. The Dallas court of appeals in *Swenson v. State* stated:

> In the absence of an allegation that the magistrate abandoned the neutral role—that is, the magistrate served as a rubber stamp for police or acted as an "adjunct" officer—suppression of evidence obtained with a warrant later found to be defective is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause.

No. 05-09-00607-CR, 2010 WL 924124, at *2 (Tex. App.—Dallas Mar. 16, 2010, no pet.) (mem. op., not designated for publication). In other words, the courts should apply the good faith exception whenever possible unless there is actual bad faith on the part of the officer or magistrate. The good faith exception is meant to cover situations exactly like this: an officer tells the truth in his affidavit, there is a basis for probable cause, but the warrant is invalid due to a technicality in its issuance. The good faith exception seeks to include important evidence that was obtained in good faith, rather than to exclude evidence and hamper the court and the jury's

ability to reach the truth due to a technicality.

This is where the Fort Worth Court errs in applying *McClintock* to a warrant's defect in form, rather than in substance. *McClintock* and its progeny deal with the issue of probable cause and tainted evidence that invalidates the basis for a warrant—i.e., the interaction of the fruit-of-the-poisonous-tree doctrine and the good faith exception. *McClintock* does not address the issue of "technical" defects in the warrant. This is because defects in form are not fruit of the poisonous tree and are not based on an officer's bad conduct. Rather, such mistakes are simply the result of human error, and the basis of the warrant itself is not considered tainted. Thus, courts have consistently held that defects in a warrant's form are covered by the good faith exception. *See Flores v. State*, 367 S.W.3d 697, 702-03 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd) (affidavit was sworn to by assistant district attorney, not magistrate); *Hunter v. State*, 92 S.W.3d 596, 602–04 (Tex. App.—Waco 2002, pet. ref'd), *overruled on other grounds by Smith v. State*, 207 S.W.3d 787 (Tex. Crim. App. 2006) (affidavit was unsigned); *Brent v. State*, 916 S.W.2d 34, 37–38 (Tex. App.—Houston [1st Dist.] 1995, pet. ref''d) (affidavit was unsigned). The "bad faith" that the good faith exception seeks to exclude is not an officer's ignorance or mistake in complying with the formulaic components of a warrant. These mistakes cannot be discouraged through evidentiary exclusion. Rather, the good faith exception seeks to exclude poisonous fruit – evidence obtained through problematic

false information or constitutional violations such as, in the case of *McClintock*, an illegal dog sniff.

The trial court in this case found that the good faith exception applied because it determined that Officer Bonner, though perhaps inexperienced as an officer, nevertheless did not act maliciously or with bad faith in failing to swear on his affidavit. [CR 27-30]. This was not an instance where the warrant was tainted by false statements or illegal conduct on the part of the officer. As this Court noted in *Smith v. State*, "Forgetfulness or carelessness in the formalities of an affidavit may well indicate to either the issuing magistrate or the reviewing [trial] court that the officer is forgetful or careless in his factual statements as well. Such forgetfulness *may affect the credibility of the officer, but that is a matter for magistrates and trial courts.*" 207 S.W.3d 787, 792 (Tex. Crim. App. 2006) (emphasis added).

Here, the magistrate failed to notice that the affidavit was unsworn, and issued the warrant. The trial court determined that, though there were errors in the warrant, Officer Bonner was acting in good faith in obtaining and executing the warrant. Thus, the trial court found Officer's Bonner's testimony regarding his error to be credible—that he did not know he made an error, and that he would not have executed a defective affidavit had he known of his error. [RR 2:20-21, 25, 27]. Contrary to the trial court's credibility determination, the Fort Worth Court determined that no officer could make an error of such magnitude without

recognizing that he made an error.

The legal question before the Fort Worth Court was whether the good faith exception would apply to a warrant with an unsigned affidavit. And the Fort Worth Court indicated in dicta that under normal circumstances the good faith exception would apply. *Wheeler*, 573 S.W.3d at 447 [App. A] ("And although the good-faith exception applies even to an infirmity under the Texas Constitution, we cannot apply it under the singular and unusual facts of this case."). But, rather than looking at the question of law regarding the application of the rule, the Fort Worth Court looked to the magnitude of Officer Bonner's error to make a factual credibility determination.

*McClintock* and its progeny focus on the good faith exception's requirement that a warrant be based on probable cause, and deal with the intersection of the fruit-of-the-poisonous-tree doctrine and the good faith exception. *McClintock* is meant to apply to a police officer's illegal conduct in providing information in the warrant affidavit or where "fruit of the poisonous tree" evidence is used as the basis for a warrant. This "line of validity" test is not meant to analyze the magnitude or seriousness of an officer's error as to a warrant's form. The Fort Worth Court erred in applying *McClintock's* "line of validity" test to the facts of this case.

### B. An objectively reasonable officer should be allowed to rely on the magistrate's approval of a warrant, even if the magistrate erred.

The Fort Worth Court focuses entirely on Officer Bonner's error in failing to swear an affidavit in requesting a warrant. However, the Fort Worth Court glosses

over the ultimate error in this case: the magistrate's signature indicating that the affidavit was sworn to in front of her. [RR 3:State's Ex. 5, App. B]. While Bonner's signature styles him as the "Affiant," his signature does not contain a false assertion. Rather the false statement in the warrant is actually the signature by the magistrate, indicating that the Affiant appeared before her and swore the statement.

WHEREFORE, based upon this affidavit and Beeman v. State, 86 S.W.3d 613 (Tex. Crim. App. 2002), Affiant asks for a search warrant that will authorize Affiant or Affiant's agent to search the person of the suspect for the blood evidence described above and seize the same as evidence that the offense described was committed and that the suspect committed the said offense.

Further Affiant asks for issuance of an order to appropriate third parties directing them to assist Affiant in the execution of said warrant.

Affiant

Subscribed and sworn to before me on this 9 day of July, 2016, by an official authorized to administer and authorize this oath pursuant to TEX. GOV'T CODE §602.002.

Judge / Peace Officer / Notary

ASSOCIATE JUDGE SARA JANE DEL CARMEN

Official's Printed Name & Title

[RR 3:State's Ex. 5, App. B]. In other words, had the magistrate noticed the language of the signature block, she would have known that the affidavit had not been properly attested to. It is the magistrate's signature that creates the false statement. Thus, the imposition of the exclusionary rule under these circumstances does not serve to deter an officer's bad conduct, but rather, it punishes a magistrate's

mistake.

The good faith exception is not designed to deter magistrate error. In *Leon*, the United States Supreme Court held:

> Imposition of the exclusionary sanction is not necessary meaningfully to inform judicial officers of their errors, and we cannot conclude that admitting evidence obtained pursuant to a warrant while at the same time declaring that the warrant was somehow defective will in any way reduce judicial officers' professional incentives to comply with the Fourth Amendment, encourage them to repeat their mistakes, or lead to the granting of all colorable warrant requests.

468 U.S. 897, 917, 104 S.Ct. 3405, 3417-18 (1984). In Texas, like at the federal level, there is a constitutional preference for searches to be conducted pursuant to search warrants, rather than by an exception to the warrant requirements. *State v. McLain*, 337 S.W.3d 268, 271-72 (Tex. Crim. App. 2011). The purpose of the warrant requirement and the good faith exception is not served by punishing an officer for relying on a warrant that was mistakenly approved by a magistrate. Thus, it is problematic to require an "objectively reasonable officer" to question the magistrate's approval of an affidavit. This is contrary to how the courts generally expect an objectively reasonable officer to act. *See Dunn v. State*, 951 S.W.2d 478, 479 (Tex. Crim. App. 1997) (applying the good faith exception to warrant when magistrate inadvertently failed to sign arrest warrant); *Woods v. State*, 14 S.W.3d 445, 449 (Tex. App.—Fort Worth 2000, no pet.) (applying the good faith exception to warrant that failed to specifically name the offense per Tex. Code Crim. Proc. art.

15.02(2)).

And while the Fort Worth Court wrongly tried to extend *McClintock's* "line of validity" test to defects in form, applying the good faith exception in the instant case is actually a logical extension of a portion of this Court's reasoning in *McLintock*. There, this Court held that an officer who reasonably believes that the information he submitted in a probable cause affidavit was legally obtained would have "no reason to believe the resulting warrant was tainted." *McLintock*, 541 S.W.3d at 73. Likewise, an officer who receives a warrant that is valid on its face and has been approved as to form by a magistrate would have no reason to believe that the warrant was in fact defective. This is because, "In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient." *Leon*, 468 U.S. at 921. An objectively reasonable officer would likely consider a warrant that was approved and signed by a magistrate to be valid.

The Fort Worth Court diverges from other appellate courts that have held that an officer receiving a search warrant signed by a magistrate and supported by an affidavit claiming to be sworn under oath could reasonably rely on that search warrant. *See Longoria*, 2018 WL 5289537, at *6; *Flores*, 367 S.W.3d at 703; *Swenson*, 2010 WL 924124, at *4. While the Fort Worth Court discusses the holding of *Longoria* in the context of whether the affidavit was sworn, it rejects the Austin

Court's ultimate holding. At the suppression hearing, the trial court in *Longoria* ruled that the officer had placed himself in jeopardy of a perjury charge if the affidavit were false, and thus the affidavit was sufficiently sworn. 2018 WL 5289537, at *4. However, on appeal the Austin Court held that assuming the affidavit was defective, the good faith exception nonetheless applied. *Id.* Thus, in *Longoria*, *even though the officer knew that his affidavit was unsworn*, the officer believed that he had complied with the requirements for a valid warrant, and the warrant "objectively indicates that it was based on a sworn affidavit." *Id.* at **5-6.

The Dallas Court of Appeals also considered this issue in *Swenson v. State.* At the time *Swenson* was decided, courts were divided regarding the validity of a search warrant sworn to over the phone. 2010 WL 924124, at *2. The defendant did not challenge the truth of the affidavit or that probable cause existed. *Id.* at *4. The court assumed that a telephonic oath was invalid, but held that the good faith exception would apply. *Id.* at *2. The court reasoned that the officer acted in objective good faith because "[h]aving repeatedly obtained warrants under the procedure used by the magistrate, [the officer] could believe in objective good faith the warrant was valid." *Id.* at *4; *see Flores*, 367 S.W.3d at 703 (applying good faith exception to defectively sworn warrant when officer testified that he followed standard procedure and warrant contained language indicating it was made under oath).

Contrary to the Austin and Dallas courts, the Fort Worth Court held that an objectively reasonable officer who made a mistake (rather than a knowingly false statement) in applying for a warrant would have known that the warrant was invalid even though it was approved by a magistrate. But this holding does not align with reality. On its face, Officer Bonner's search warrant signed by the magistrate indicated that it was issued on probable cause after reviewing an affidavit, in writing, under oath, "which objectively indicates that it was based on a sworn affidavit." *Longoria*, 2018 WL 5289537, at *6. Officer Bonner testified that he followed the same procedure he always did, and that he used a pre-printed form prepared by the police department. [RR 2:7, 19-20]. His affidavit, prepared in his normal manner, was signed and approved by the magistrate, as it had been every time before. [RR 2:18-20]. And, once the magistrate signed the warrant, it appeared valid on its face. [RR 3:State's Ex. 5, App. B]. Thereafter, the search warrant was issued which was used to obtain the blood draw. [RR 3:State's Ex. 5, App. B]. Under these facts, the Fort Worth Court held that Officer Bonner could not have been acting reasonably under the circumstances. Rather, Officer Bonner should have questioned the magistrate's approval of his affidavit. This subverts the typical and expected relationship between magistrate and officer. *See Leon*, 468 U.S. at 921. And ultimately, the Fort Worth Court's holding requires the impossible: for an "objectively reasonable officer" to both know what he does not know (that he has

unknowingly made an error) and to know that a magistrate has erred in approving his error.

As discussed above, the exclusionary rule is meant to exclude evidence obtained by an officer's bad faith—his lies or illegal conduct that he knowingly uses to obtain an affidavit on false grounds. The good faith exception is meant to cover the space in between the perfect warrant and the knowingly false warrant—where an officer has told the truth and tried to follow the law, but the warrant is defective for some reason. As the *Leon* court noted, "the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates." 468 U.S. at 916. Here, the trial court correctly determined that although Officer Bonner was perhaps uneducated regarding the proper warrant requirements, he was not acting in bad faith, and the magistrate's error validated his belief that he was acting appropriately in obtaining the warrant. Because the good faith exception is not designed to punish magistrate error, and because an officer cannot be expected to supersede a magistrate's approval of a warrant, the trial court did not err in applying the good faith exception.

## CONCLUSION AND PRAYER

The Fort Worth Court has taken bad facts and ultimately crafted a rule that cannot be applied without stripping the good faith exception of its original purpose. The good faith exception is meant to cover just that—good faith attempts by an

officer to follow the law, tell the truth, and obtain a warrant to search for evidence. The Fort Worth Court would require the "objectively reasonable officer" to act with perfection in all circumstances. He must recognize his own unknown errors, and those of the magistrate.

The State prays that this Court reverse the judgment of the court of appeals, affirm the trial court's denial of Wheeler's motion to suppress evidence, and affirm the trial court's judgment.

Respectfully submitted,

SHAREN WILSON
Criminal District Attorney
Tarrant County, Texas

JOSEPH W. SPENCE
Assistant Criminal District Attorney
Chief, Post-Conviction

/s/ SHELBY J. WHITE
SHELBY J. WHITE
Assistant Criminal District Attorney
Tim Curry Criminal Justice Center
401 W. Belknap
Fort Worth, Texas 76196-0201
(817) 884-1687
FAX (817) 884-1672
State Bar No. 24084086
COAappellatealerts@tarrantcountytx.gov

## CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Tex. R. App. P.

9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i) because it contains 4,187 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1), as computed by the computer software used to prepare the document.

/s/ SHELBY J. WHITE
SHELBY J. WHITE

**CERTIFICATE OF SERVICE**

On the 25th day of October, 2019, a true copy of the State's petition for discretionary review has been e-served on the parties below:

Stephanie M. Gonzales,
P.O. Box 121728
Arlington, Texas, 76012
gonzaleslawdfw@gmail.com

J. Daniel Clark
150 Reserve St, Suite 190
Southlake, Texas, 76092
jdc@jdanielclark.com

State Prosecuting Attorney's Office
information@spa.texas.gov

/s/ SHELBY J. WHITE
SHELBY J. WHITE

**No. PD-0388-19**

IN THE COURT OF CRIMINAL
APPEALS OF TEXAS

---

**CHASE ERICK WHEELER,**

***APPELLANT***

**V.**

**THE STATE OF TEXAS,**

***APPELLEE***

---

*From the Court of Appeals for the Second District of Texas*
*No. 02-18-00197-CR*
*Appeal from Cause No. 1473192 in County Criminal Court No. 3 of Tarrant County, Texas, the Hon. Bob McCoy Presiding*

---

## APPENDIX

App. A: Court of Appeals' Opinion in *Wheeler v. State*, 573 S.W.3d 437 (Tex. App.—Fort Worth 2019)

App. B: Search Warrant [RR 3:State's Ex. 5]

App. C: Relevant Statutory and Constitutional Provisions

# App. A

# In the
# Court of Appeals
# Second Appellate District of Texas
# at Fort Worth

---

No. 02-18-00197-CR

---

CHASE ERICK WHEELER, Appellant

V.

THE STATE OF TEXAS

---

On Appeal from County Criminal Court No. 3
Tarrant County, Texas
Trial Court No. 1473192

---

Before Gabriel, Pittman, and Bassel, JJ.
Opinion by Justice Gabriel

## OPINION

Appellant Chase Erick Wheeler appeals from the trial court's denial of his pretrial motion to suppress blood-alcohol evidence seized under a warrant that was supported by an unsworn affidavit. In what Wheeler and the State both declare is an issue of first impression, we are asked to decide whether the good-faith exception to the statutory exclusionary rule allows admission of this evidence even though it was obtained in violation of the Texas Constitution's oath requirement. Under the singular facts of this case, we conclude that it does not.

## I. BACKGROUND

### A. THE ARREST

The facts surrounding Wheeler's arrest and the issuance of the search warrant are largely undisputed. On July 9, 2016, Officer Tyler Bonner, who at the time had worked for the Pantego Police Department (Pantego) for one year and two months,[1] responded to a report that a driver was asleep behind the wheel of an idling car in the drive-through lane of a fast-food restaurant. Bonner arrived, woke the driver up, and noted that he appeared intoxicated. The driver, identified as Wheeler, refused to perform any field-sobriety tests but told Bonner that he had "consumed 4 beers." Bonner arrested Wheeler and drove him to the police department to get a search warrant for Wheeler's blood after Wheeler refused to supply a sample.

[1]Apparently, this was Bonner's first employment as a police officer after leaving the training academy.

### B. THE SEARCH WARRANT

Pantego routinely prepares premade packets that include several fill-in-the-blank forms: an affidavit for a search warrant, a search warrant, an order to execute the warrant, and a return. The affidavit form includes a recital that the "undersigned Affiant, a peace officer . . ., and after first being duly sworn, on oath makes the following statements and accusations." Bonner filled out the affidavit form, supplying the probable-cause facts that he believed supported the issuance of a search warrant for a compelled sample of Wheeler's blood. These facts included that Wheeler had a moderate odor of alcohol and that his speech was slurred and confused. Bonner signed the affidavit, affirming that it was sworn by his oath, and dated the jurat on the affidavit. Bonner then gave the packet to the dispatcher who called the magistrate and electronically sent the packet to her.

The magistrate, Sara Jane Del Carmen, knew that the arrangement of Pantego's office space dictated that the requesting officer physically hand the packet documents to the dispatcher who would then electronically forward the packet. When Del Carmen received Bonner's packet, she reviewed the affidavit, determined that probable cause had been established, and electronically signed the affidavit's dated jurat and the warrant. The jurat provided: "Subscribed and sworn to before me on this 9 day of July, 2016, by an official authorized to administer and authorize this oath pursuant to TEX. GOV'T CODE § 602.002." Del Carmen did not notice that Bonner's affidavit, unlike other affidavits she had seen from Pantego officers, did not

have another officer's badge number or a notary's stamp on it. Del Carmen admitted that she had signed the jurat in error because she had "missed" that Bonner's affidavit was not sworn. But at the time, Del Carmen believed probable cause for a search warrant had been established and did not see any defects in Bonner's affidavit. She electronically signed the warrant, authorizing officers to take a sample of Wheeler's blood, and electronically returned the packet to the dispatcher. The warrant included a recitation that the affiant—Bonner—"did heretofore this day subscribe and swear to said affidavit before me"—Del Carmen.

The dispatcher informed Bonner that the warrant had been signed. The warrant was executed, and Wheeler's blood draw occurred approximately one hour after his arrest. *See* Tex. Code Crim. Proc. Ann. art. 18.06. On Pantego's blood-room-procedure form, Bonner did not indicate whether the blood draw was pursuant to Wheeler's consent or a search warrant. He later did not remember why he did not circle "Search Warrant" on that form. Bonner signed the return as the affiant, but Del Carmen never signed it.[2] *See id.* art. 18.10. Wheeler's blood-alcohol content was 0.14.

---

[2]Bonner did not remember if he signed the return before or after he was informed Del Carmen had signed the warrant. Del Carmen testified that Bonner had already signed the return when she received the packet and that it was not "typical[]" for Pantego officers to sign the return before the warrant was issued. A return cannot be made by the officer until after the warrant is executed. *See* Tex. Code Crim. Proc. Ann. arts. 18.06(a), 18.10. However, these deficiencies in the return do not mandate suppression of the blood-alcohol evidence. *See id.* art. 18.10 ("The failure of an officer

### C. THE MOTION TO SUPPRESS AND APPEAL

Wheeler was charged by information with the class B misdemeanor of driving while intoxicated. *See* Tex. Penal Code Ann. § 49.04(a)–(b). Before trial, he filed a motion to suppress the seized blood-alcohol evidence, arguing that the warrant was invalid because it was based on an unsworn affidavit and therefore violated the United States and Texas Constitutions.[3]

At the trial court's December 19, 2017 evidentiary hearing, Bonner testified that he did not fabricate the probable-cause facts included in his affidavit. Although he had been trained at the police academy about the oath requirement for warrant affidavits, Pantego did not reinforce that he needed an oath or its equivalent administered before submitting the affidavit. In fact, he stated that he had never before sworn to a probable-cause affidavit in the fourteen months he was a Pantego officer and that he had previously applied for search warrants from Del Carmen. At the suppression hearing, Bonner admitted that he was aware of the constitutional oath requirement for search-warrant affidavits based on his prior academy training.[4] When

---

to make a timely return of an executed search warrant . . . does not bar the admission of evidence under Article 38.23 [i.e., the exclusionary rule].").

[3]Wheeler also sought suppression because of a lack of reasonable suspicion or probable cause. The trial court denied these portions of the motion, and Wheeler does not attack that denial on appeal.

[4]At the time of the hearing, Bonner was employed by the Farmers Branch Police Department. Before that and after leaving Pantego, Bonner worked for the Dalworthington Gardens Department of Public Safety.

Bonner was asked if an oath had been administered or if someone watched him sign the affidavit for Wheeler's warrant, Bonner stated, "Not that I remember." Bonner admitted that he never communicated directly with Del Carmen that night. But he testified that he followed what he believed to be Pantego's standard procedure in obtaining the search warrant. Bonner was familiar with oaths and understood that the probable-cause facts in his affidavit were never properly sworn. Bonner could not remember if he saw the signed search warrant, but he was not subjectively aware of any defects in his affidavit at the time and he subjectively believed he had a valid search warrant.

Del Carmen testified that she previously had seen many warrant affidavits from Pantego officers and that they ordinarily were sworn either before another officer or before a notary before being sent to her by the dispatcher. She did not notice that Bonner's affidavit was not sworn and she did not administer an oath to Bonner that night. Based on her knowledge of Pantego procedure regarding officers' handing the packet to the dispatcher to forward to her, Del Carmen believed that an attestation to the affidavit could have occurred. But she testified that based on the packet she received regarding Wheeler's warrant, there was no indication of an attestation. Del Carmen agreed that Bonner's affidavit provided no verified facts supplying probable cause for the search warrant.

The dispatcher did not testify at the hearing and was no longer employed by Pantego. The trial court took judicial notice that the dispatcher was terminated for "the creation of fictitious, racial profiling codes."

The trial court denied Wheeler's motion on January 9, 2018. In its carefully crafted order, the trial court framed the issue: "Is the good faith exception provision in Article 38.23(b) Code of Criminal Procedure applicable under these facts so that the exclusionary rule contained in Article 38.23(a) is inapplicable?" The trial court, after paying "particular attention" to the plain language of the good-faith exception in article 38.23(b), found that the unsworn affidavit was a procedural mistake, not a substantive error, that fell within the good-faith exception to article 38.23(a)'s exclusionary rule. *See* Tex. Code Crim. Proc. Ann. art. 38.23.

After pleading guilty under a plea-bargain agreement, Wheeler now appeals the trial court's denial of his pretrial motion to suppress. *See id.* art. 44.02. The trial court certified that Wheeler had the right to appeal from the trial court's suppression ruling notwithstanding that his guilty plea was the result of a plea bargain. *See* Tex. R. App. P. 25.2(a)(2)(A), (d). Wheeler now argues that because Bonner's affidavit was not sworn, the evidence seized under the subsequently issued warrant should have been suppressed because it violated the affidavit and warrant requirements found in the Texas Constitution,[5] which could not be cured by the exclusionary-rule exception

[5]Although Wheeler contends in passing that the search also violated his federal constitutional rights under the Fourth and Fourteenth Amendments, he substantively

found in the code of criminal procedure. *See State v. Villarreal*, 475 S.W.3d 784, 811–12 (Tex. Crim. App. 2014) (5-4 decision) (recognizing legislature cannot create "new exception to the warrant requirement" contrary to constitutional, guaranteed rights); *Ex parte Ainsworth*, 532 S.W.2d 640, 641 (Tex. Crim. App. 1976) (recognizing legislature cannot alter the scope of constitutional protections by statute). *See generally Wilson v. State*, 311 S.W.3d 452, 458 (Tex. Crim. App. 2010) (recognizing Texas's exclusionary rule provides broader protections than does federal, judicially created rule); *State v. Huddleston*, 387 S.W.3d 33, 40 n.11 (Tex. App.—Texarkana 2012, pet. ref'd) (noting Texas's statutory good-faith exception more limited than federal, nonstatutory counterpart).

## II. STANDARD OF REVIEW

In general, when tasked with the review of a trial court's suppression ruling, we use a bifurcated standard of review—giving almost total deference to historical-fact and application-of-law-to-fact questions that turn on an evaluation of credibility and demeanor and reviewing de novo application-of-law-to-fact questions that do not turn on credibility and demeanor. *Amador v. State*, 221 S.W.3d 666, 673 (Tex. Crim. App.

---

argues only the application of the good-faith exception to the Texas Constitution's requirements. He affirmatively states in his brief that the "federal exclusionary rule . . . has no applicability to this case" and that he "makes no argument that the blood evidence should be suppressed by operation of the federal exclusionary rule." Because Wheeler did not substantively brief the United States Constitution or the federal exclusionary rule, we will not address them. *See Merrick v. State*, Nos. 02-17-00035-CR, 02-17-00036-CR, 2018 WL 651375, at *4 (Tex. App.—Fort Worth Feb. 1, 2018, pet. ref'd).

2007). The facts presented here are undisputed, and we are presented with a question of law: Can the good-faith exception to the exclusionary rule excuse the affidavit-oath requirement found in the Texas Constitution and code of criminal procedure? Because this issue solely implicates the trial court's application of undisputed facts to the law, we review the ruling de novo and will affirm it if it is correct under any applicable legal theory. *See State v. Stevens*, 235 S.W.3d 736, 740 (Tex. Crim. App. 2007); *Blaylock v. State*, 125 S.W.3d 702, 705 (Tex. App.—Texarkana 2003, pet. ref'd). Further, because Wheeler's arguments implicate the scope of the statutory exclusionary rule and its exception, our question is one of statutory construction, which is also reviewed de novo. *See McClintock v. State*, 541 S.W.3d 63, 67 (Tex. Crim. App. 2017). Finally, because the good-faith exception is just that—an exception—the State had the burden to show its applicability to justify admission of the blood-alcohol results in response to Wheeler's motion to suppress. *See* 41 George E. Dix & John M. Schmolesky, *Texas Practice: Criminal Practice & Procedure* § 18:28 (3d ed. 2011); *cf.* Tex. Penal Code Ann. § 2.02(b) (placing burden of proof on the State to negate any labeled exception to commission of an offense).

## III. AFFIDAVIT AND WARRANT REQUIREMENTS

### A. PURPOSE OF THE OATH REQUIREMENT

The Texas Constitution provides that lawful issuance of a search warrant is dependent on three requirements: (1) a particular description of the person or thing to be searched, (2) facts establishing probable cause, and (3) supported by oath or

affirmation. Tex. Const. art. I, § 9. The Texas Legislature codified these requirements, including that the affidavit be under oath or by affirmation, i.e., sworn. Tex. Code Crim. Proc. Ann. art. 1.06 (tracking oath-or-affirmation language in Texas Constitution), art. 18.01(b) ("A sworn affidavit setting forth substantial facts establishing probable cause shall be filed in every instance in which a search warrant is requested."). Thus, "an oath is both constitutionally and statutorily **indispensable**" in the context of a search-warrant affidavit. *Clay v. State*, 391 S.W.3d 94, 97–98 (Tex. Crim. App. 2013) (emphasis added). To qualify as a sworn affidavit, the declaration of facts contained within the affidavit must be confirmed by oath or its equivalent. *See id.*; *Vaughn v. State*, 177 S.W.2d 59, 61 (Tex. Crim. App. 1943) (op. on reh'g) (quoting *Ex parte Scott*, 123 S.W.2d 306, 311 (Tex. 1939)).

The State concedes that Bonner was not administered an oath before he signed the affidavit. But the State asserts that the oath language in the affidavit's preamble, in the jurat, and in the warrant's preamble show that the purpose of the oath was fulfilled, allowing the affidavit to be considered sworn. The purpose of an oath "is to call upon the affiant's sense of moral duty to tell the truth and to instill in him a sense of seriousness and responsibility." *Smith v. State*, 207 S.W.3d 787, 790 (Tex. Crim. App. 2006). But if "the record indicates that 'the affidavit was solemnized by other means,'" the affidavit is sufficient to support the issuance of a search warrant. *Clay*, 391 S.W.3d at 97–98 (quoting *Smith*, 207 S.W.3d at 791).

Here, there is no evidence from which it could be said that Bonner signed his affidavit with "a sense of seriousness and responsibility" or with a "sense of [his] moral duty to tell the truth." *Smith*, 207 S.W.3d at 790. At the suppression hearing, Bonner testified that he understood the meaning of the oath he took before he began his testimony but he did not state that he had that same understanding at the time he signed his affidavit. Indeed, he was not asked if that was the case. Other than his testimony that he had not falsified the affidavit facts, he did not testify that he signed the affidavit with a knowledge of its seriousness such that he would be subject to perjury. *See id.* ("When an individual swears under oath, society's expectation of truthfulness increases and the legal consequences for untruthfulness—prosecution for perjury, for example—may be severe.").

Bonner did not take an oath or otherwise attest to the affidavit facts before having the dispatcher forward the packet to Del Carmen, and Del Carmen specifically testified that she had not administered an oath to Bonner. Both agreed that they never spoke to each other that night, and Bonner testified that he had never before sworn an oath in front of anyone to procure a warrant. And both recognized that the jurat's oath recital never occurred. We cannot conclude that the oath recitations in the affidavit's and warrant's preambles or in the jurat were sufficient to consider the affidavit sworn. The evidence reflects the opposite—no oath or its equivalent occurred. Del Carmen testified that the oath statement in the warrant's preamble

never happened and opined that the affidavit was not sworn.[6] This uncontradicted, affirmative evidence that there was no oath or affirmation to the affidavit compels us to conclude that the oath recitations relied on by the State were false and cannot render the affidavit sworn. *See generally id.* at 790 n.13 (stating "an oath is a matter of substance, not form").

These facts distinguish this case from the cases relied on by the State to support its argument that the oath recitations can render an affidavit sworn. In *Longoria v. State*, the court recognized that although the officer testified he had not been formally sworn before signing his affidavit, he stated that he signed the affidavit "swearing that everything in it [was] true," believing that he had complied with the oath requirement, and no evidence contradicted the oath recitals in the subsequently issued warrant. No. 03-16-00804-CR, 2018 WL 5289537, at *4–6 (Tex. App.—Austin Oct. 25, 2018, no pet.) (mem. op., not designated for publication); *see also Ashcraft v. State*, No. 03-12-00660-CR, 2013 WL 4516193, at *6–7 (Tex. App.—Austin Aug. 20, 2013, no pet.) (mem. op., not designated for publication) (holding oath recitals combined with evidence another officer witnessed affiant signing affidavit rendered affidavit sworn). In *Hardy v. State*, the court of criminal appeals held that a perjury

[6]Del Carmen stated that because she knew an applying Pantego officer would physically hand the warrant packet to the dispatcher, she would "ordinarily, . . . have considered it attested to." But no evidence shows that Bonner attested to the affidavit to the dispatcher. Bonner testified that he had never sworn or attested to his affidavits before, and Del Carmen testified that there was no indication that Bonner attested to the affidavit in front of the dispatcher.

conviction did not require evidence that the affiant was actually present before the notary public at the time the oath was executed in light of the signed jurat, which stated that the affidavit was sworn to before the notary. 213 S.W.3d 916, 917 (Tex. Crim. App. 2007). But in *Hardy*, the court of criminal appeals relied on a statute applicable to perjury prosecutions that vitiated any defense based on an oath's irregularity if the document contained an oath recital, if the declarant was aware of the recital at the time he signed the document, and if the document contained a signed jurat. *Id.* (citing Tex. Penal Code Ann. § 37.07(b)). Bonner testified that he was not aware his affidavit needed to be sworn at the time he made the affidavit. Further, there is no indication in *Hardy* that there was affirmative evidence that the jurat was false as we have here.

Other courts have considered an affidavit to be sworn if there was some indication that an oath was made or if there was no evidence to contradict the oath recitals. *See Flores v. State*, 367 S.W.3d 697, 702–03 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd); *Brent v. State*, 916 S.W.2d 34, 37–38 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd); *cf. Smith*, 207 S.W.3d at 791–92 (holding failure to sign warrant affidavit does not invalidate warrant "if other evidence proves that the affiant personally swore to the truth of the facts in the affidavit before the issuing magistrate"). Here, the evidence was undisputed that no oath or its equivalent was made, and both Bonner and Del Carmen contradicted the oath recitals in the affidavit,

the jurat, and the warrant. Bonner's affidavit was not improperly sworn; it was completely unsworn.

## B. THE EXCLUSIONARY RULE AND ITS GOOD-FAITH EXCEPTION

### 1. Application of Exclusionary Rule

Because there was no oath or its equivalent that would render Bonner's affidavit sworn, his affidavit violated constitutional and statutory requirements. *See* Tex. Const. art. I, § 9; Tex. Code Crim. Proc. Ann. arts. 1.06, 18.01(b). The Texas exclusionary rule forbids the admission of evidence that was obtained "in violation of any provision of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America," which clearly would apply to violations of the "indispensable" oath requirement. Tex. Code Crim. Proc. Ann. art. 38.23(a); *Clay*, 391 S.W.3d at 97–98; *see Longoria*, 2018 WL 5289537, at *4–6 (applying good-faith exception to facially unsworn search-warrant affidavit and concluding blood-alcohol evidence admissible because officer testified he thought he had complied with the law, believed his affidavit had been sworn, stated that he signed the affidavit "swearing that everything in it is true," and no evidence contradicted the warrant's oath recitals); 40 Dix & Schmolesky, *supra*, at § 7:21 ("The plain language of Article 38.23 makes clear that it applies to evidence obtained in violation of any provision of the Constitution of the State of Texas."); *cf. McClintock*, 541 S.W.3d at 73–74 (applying exclusionary rule's good-faith exception to evidence seized pursuant to warrant affidavit that "failed to establish probable cause" as constitutionally required). But

Wheeler's blood-alcohol evidence would be excepted from this exclusion if it "was obtained by a law enforcement officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause." Tex. Code Crim. Proc. Ann. art. 38.23(b); *see McClintock*, 541 S.W.3d at 74 (concluding officers' conduct was objectively "close enough" to valid in making affidavit that the subsequent search was executed in good-faith reliance on the issued warrant).

### 2. Application of Good-Faith Exception

The State contends that the good-faith exception has been applied to affidavits and warrants with other constitutional infirmities, which justifies its application to the admission of Wheeler's blood-alcohol evidence. Indeed, many sins have been forgiven by the good-faith exception as pointed out by Wheeler in his brief, leading some to suggest that its reach potentially is limitless absent evidence of a false statement in the affidavit that the affiant made knowingly, intentionally, or recklessly.[7]

---

[7] *See, e.g.*, *State v. Crawford*, 463 S.W.3d 923, 932 (Tex. App.—Fort Worth 2015, pet. ref'd) (Dauphinot, J., concurring) (op. on reh'g) ("As I understand the state of the law in Texas, once the warrant issues, the only challenge that will lie is a [lack-of-good-faith-reliance] challenge. Surely lawyers are not being put in the position of being able to challenge the admissibility of evidence obtained pursuant to a defective warrant only by attacking the integrity of the officer who swore to the affidavit."); *cf. McClintock*, 541 S.W.3d at 75 (Alcala, J., dissenting) ("Given that the plain language in Article 38.23(b) requires the existence of probable cause for the exception in that portion of the statute to apply, and given this Court's former determination that this search warrant was issued in the absence of any probable cause under a correct application of the law, I would apply the general rule in Article 38.23(a) and hold that the evidence must be suppressed."); *Simmons v. State*, 7 S.W.2d 78, 79 (Tex. Crim. App. 1928) (holding in case decided before good-faith exception enacted, search-warrant affidavit based only on information and belief of affiant, with no supporting facts or

The court of criminal appeals has clarified that article 38.23's good-faith exception applies if the prior law-enforcement conduct was close enough to "the line of validity" such that an objectively reasonable officer preparing the affidavit or executing the warrant would believe that the information supporting the warrant was not tainted by unconstitutional conduct. *McClintock*, 541 S.W.3d at 72–73 (quoting and relying on *United States v. Massi*, 761 F.3d 512, 528 (5th Cir. 2014)).

Under the clear language of the good-faith exception, Wheeler's blood-alcohol evidence would have been admissible notwithstanding the absence of an "indispensable" oath if (1) Bonner acted in objective good-faith reliance on the warrant, (2) Del Carmen was a neutral magistrate, and (3) the warrant was based on probable cause. *See* Tex. Code Crim. Proc. Ann. art. 38.23(b); *McClintock*, 541 S.W.3d at 67; *Clay*, 391 S.W.3d at 97–98. Wheeler does not dispute that Del Carmen was neutral or that Bonner's unsworn affidavit facts established probable cause for the issuance of a warrant.[8] What Wheeler disputes is whether Bonner acted in objective

---

circumstances, subject to exclusionary rule); *State v. Hill*, 484 S.W.3d 587, 592–93 (Tex. App.—Austin 2016, pet. ref'd) (recognizing limited nature of article 38.23(b) and holding good-faith but incorrect reliance on statute or appellate precedents not included in exception, which applies only to good-faith reliance on warrant).

[8]To the extent Wheeler argues that the warrant was in fact not issued because of the lack of an affidavit oath, we disagree. Issuance has been defined as occurring when "a neutral magistrate finds probable cause to issue the warrant and signs the accompanying affidavit." *White v. State*, 989 S.W.2d 108, 110 (Tex. App.—San Antonio 1999, no pet.). Other than a passing reference to Del Carmen's illegible signature, Wheeler does not challenge these elements for issuance. And Del Carmen

good-faith reliance on the issued warrant given that the exclusionary rule's purpose is to deter police misconduct. *See Brick v. State*, 738 S.W.2d 676, 679 n.5 (Tex. Crim. App. 1987); *Self v. State*, 709 S.W.2d 662, 668 (Tex. Crim. App. 1986); *Flores*, 367 S.W.3d at 697; *Brent v. State*, 916 S.W.2d 34, 38 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd).

Here, Bonner testified that he had been trained on the oath requirement for search warrants but that when he began working for Pantego, that concept was not reinforced. Thus, he never swore to any search-warrant affidavits while working for Pantego for fourteen months. He subjectively believed that not swearing to affidavits was Pantego's standard procedure. Del Carmen testified, however, that it was normal procedure for Pantego officers to produce sworn affidavits for her review in determining probable cause. Indeed, Del Carmen "missed" that Bonner's affidavit lacked an oath or its equivalent because such affidavits from Pantego ordinarily contained either another officer's badge number or a notary stamp. Bonner's testimony was that he had been trained on the oath requirement and its constitutional underpinnings but that he subjectively believed that it was not necessary based on his incorrect assumption that Pantego did not require sworn affidavits to procure a search warrant. Thus, Bonner either wrongly assumed that Pantego officers did not submit sworn affidavits and followed suit notwithstanding his training to the contrary or he

---

testified at the suppression hearing that she electronically signed the warrant and the jurat.

repeatedly ignored the oath requirement. Bonner's subjective understanding of Pantego policy is irrelevant. *See Flores*, 367 S.W.3d at 703. No objectively reasonable officer could believe that sworn affidavits are not required in seeking search warrants. Indeed, they are "indispensable." *Clay*, 391 S.W.3d at 97–98. Bonner's submission of an unsworn affidavit was not close to the line of validity; therefore, an objectively reasonable officer preparing such an affidavit could not have believed that the subsequent warrant was not tainted by the complete absence of this constitutional and statutory requirement. *See McClintock*, 541 S.W.3d at 73. Because Bonner's failure to swear to the truth of his affidavit facts is a long-distance call away from the line of validity, he could not have acted in good-faith reliance on the issued warrant. *Cf. id.* at 74 (holding because constitutionality of drug-dog sniffs was close to the line of validity at the time of search, an objectively reasonable officer would have believed that his affidavit was not tainted by unconstitutional conduct, rendering the evidence admissible under the good-faith exception based on the officer's good-faith reliance on the issued warrant).

## IV. HARM

Because the trial court erred by denying Wheeler's motion to suppress the blood-alcohol evidence, we must determine whether that denial harmed Wheeler. *See Marcopoulos v. State*, 548 S.W.3d 697, 707 (Tex. App.—Houston [1st Dist.] 2018, pet. ref'd). Because this was error of a constitutional dimension, we must reverse the trial court's resulting judgment unless we determine beyond a reasonable doubt that the

denial did not contribute to Wheeler's decision to plead guilty. *See* Tex. R. App. P. 44.2(a); *Bonsignore v. State*, 497 S.W.3d 563, 573 (Tex. App.—Fort Worth 2016, pet. ref'd); *Forsyth v. State*, 438 S.W.3d 216, 225 (Tex. App.—Eastland 2014, pet. ref'd).

We do not have a reporter's record from the plea proceeding, but Wheeler's guilty plea standing alone is not enough to uphold his conviction. *See Marcopoulos*, 548 S.W.3d at 707 (citing Tex. Code Crim. Proc. Ann. art. 1.15). The blood-alcohol evidence, however, was enough to support his guilty plea. This evidence could have given the State leverage in its plea negotiations. Wheeler pleaded guilty only after the trial court denied his motion to suppress, indicating that the trial court's denial was a factor in his decision to plead guilty. As such, harm is established. *See Holmes v. State*, 323 S.W.3d 163, 173–74 (Tex. Crim. App. 2010) (op. on reh'g); *Kraft v. State*, 762 S.W.2d 612, 613–14 (Tex. Crim. App. 1988).

## V. CONCLUSION

We conclude that Bonner's affidavit was unsworn, rendering the evidence collected based on the executed search warrant subject to exclusion under the exclusionary rule. And although the good-faith exception applies even to an infirmity under the Texas Constitution, we cannot apply it under the singular and unusual facts of this case. Bonner was taught and had knowledge of the oath requirement yet repeatedly relied on his subjective but invalid belief that Pantego's procedures allowed for unsworn search-warrant affidavits. Bonner was not acting in objective good faith reliance on the issued warrant. Because the good-faith exception does not apply to

render the seized evidence admissible, the exclusionary rule requires that any evidence seized pursuant to the issued search warrant be suppressed. The trial court's denial of Wheeler's motion to suppress was in error, and we cannot conclude beyond a reasonable doubt that it did not play a role in Wheeler's decision to plead guilty. We sustain Wheeler's issue, reverse the trial court's January 9, 2018 order denying Wheeler's motion to suppress, reverse the trial court's subsequent judgment, and remand to that court for further proceedings consistent with this opinion. *See* Tex. R. App. P. 43.2(d), 43.3(a).

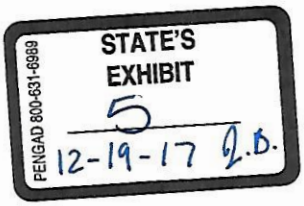
/s/ Lee Gabriel

Lee Gabriel
Justice

Publish

Delivered: March 21, 2019

# App. B




THE STATE OF TEXAS §

COUNTY OF TARRANT §

# AFFIDAVIT FOR SEARCH WARRANT AND MAGISTRATION

## I. AFFIANT

The undersigned Affiant, a peace officer under the laws of the State of Texas, and after first being duly sworn, on oath makes the following statements and accusations:

My name is T. Bowler. I am a peace officer employed by Pantego Police Dept. I have successfully completed the State-mandated requirements to become a peace officer. Additionally, I have successfully completed courses and/or training in the field of alcohol detection and intoxication-related offenses. I have seen intoxicated persons in the past and, during the course of my employment, I have observed numerous people who are under the influence of alcohol or other substances and:

□ I am certified and/or trained in the detection of impaired or intoxicated drivers through the use of three standardized field sobriety tests [SFSTs], namely: Horizontal Gaze Nystagmus [HGN], One-Leg Stand [OLS], and Walk and Turn [WAT].

□ I have formed opinions on intoxication on many occasions and have had my suspicions confirmed by breath, blood, or urine samples that were administered after I performed my law enforcement duties relating to the detection of intoxicated drivers.

## II. SUSPECT & CRIME

A. The suspected person ["suspect"] is described as follows:

| | | |
|---|---|---|
| Name: Wheeler, Chase Erick | | |
| TX DL/ID # 20589804 TX DL | | |
| Race: White | Sex: male | DOB: 01/13/1988 |
| Height: 508" | Weight: 205 | Hair Color: Brown |

B. The suspect is presently in custody of a law enforcement agency here in Tarrant County, Texas, namely the Pantego Police Department which will present the suspect to execute the warrant requested herein;

C. The suspect has possession of and is concealing human blood, which constitutes evidence that the suspect committed the offense described in paragraph D below;

D. I have good reason to believe that on the 9 day of July, 2016, the suspect did then and there operate a motor vehicle in a public place in Tarrant County, Texas, while intoxicated by not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, or a combination thereof, into the suspect's body.

## III. REASON FOR CONTACT / EVIDENCE OF OPERATING

A. My belief that the suspect committed the offense described in paragraph D above is based on the following facts:

1. On the date specified in paragraph D above, at approximately 0251 o'clock, A.M., the suspect was operating a motor vehicle in a public place in Tarrant County, Texas, namely at the following location 2501 W. Pioneer Pkwy (Jack in the box);

2. Additionally, the following information influenced my reasonable-suspicion consideration (any that apply are checked):

☐ TRAFFIC STOP: I stopped the vehicle at the above time and location for the following reason(s):_____ and, at the time of the stop, I believed that these facts, among others, possibly indicated that the suspect was committing the following Transportation Code violations: _____ and/or the offense of driving while intoxicated;

☐ ENCOUNTER: The suspect's vehicle was already stopped and I believed that the suspect had been driving and/or operating the vehicle because: _____

_____

_____

_____ and, at the time of the contact, I believed that these facts, among others, possibly indicated that the suspect was committing the following traffic and/or criminal violations: _____

_____

_____

and/or the offense of driving while intoxicated.

6 WITNESSES: One or more witnesses, Matil, Manaj, conveyed information to me about observing the suspect's actions and/or motor-vehicle operation. The details of the conveyed information included, but were not limited to: Subject ordered food in the drive-thru and fell asleep before getting to the window. Jack in the box employee Manaj Matil could not wake him up.

B. ORAL ADMISSION RE: OPERATION: The suspect admitted to me that the suspect had been operating a motor vehicle in a public place in Tarrant County, Texas just a short time prior to my arrival: YES / NO

**B. INTOXICATION EVIDENCE:**

1. GENERAL OBSERVATIONS: During my contact with the suspect, I made the following observations about the suspect:

ODOR OF ALCOHOL: Strong (Moderate) Faint None

Other: _____

SPEECH: (Slurred) (Confused) Stuttered Accent Fair Good

Other: _____

ATTITUDE: (Cooperative) Combative Indifferent Hilarious
Talkative Carefree Excited Insulting
Cocky Sleepy Profane Polite

Other: _____

BALANCE: Falling Staggering Hesitant Swaying Unsure Sure

Other: _____

WALKING: Falling Staggering Hesitant Swaying Unsure Sure

Other: _____

TURNING: Falling Staggering Hesitant Swaying Unsure Sure

Other: N/A

2. EVIDENCE OF POSSIBLE DRUG/CONTROLLED SUBSTANCE USE:

- ☐ Drug paraphernalia found
- ☐ Describe drug paraphernalia found _____
- ☐ Odor of marijuana detected (describe) _____
- ☐ Statements made by the suspect or others indicating possible drug usage:

  _____

  _____
- ☐ Other: _____

3. FIELD SOBRIETY TESTS IN GENERAL:

☐ During my contact with the suspect, I requested performance of field sobriety tests by the suspect and recorded the results and my observations of the suspect's performance of field sobriety tests and signs of intoxication which include the following:

☐ The suspect refused to perform (ALL / SOME) of the requested field sobriety tests, and this refusal indicated to me that the suspect was attempting to hide intoxication evidence: YES / NO

4. SPECIFIC FIELD SOBRIETY TESTS:

□ NYSTAGMUS: Refused All SFST

The suspect was first qualified as a candidate by checking the suspect's eyes for equal tracking, no resting nystagmus, and equal pupil size. The suspect was also qualified as a candidate by questions which revealed that he had not suffered from a head injury, did not have any medical problems, and was not currently on any medications. Additional comments: _____

HGN: Total number of observed clues ____

Circle observed clues:

L R 1. Lack of smooth pursuit

L R 2. Distinct and sustained nystagmus at maximum deviation

L R 3. Onset of nystagmus prior to 45 degrees

Vertical nystagmus: YES / NO

Other comments: _____

□ WALK AND TURN:

WAT: Total number of observed clues ____

Check appropriate clues:

_____ 1. Cannot keep balance while listening to instructions

_____ 2. Starts before instructions are finished

_____ 3. Stops while walking to steady self

_____ 4. Does not touch heel to toe

_____ 5. Loses balance while walking (i.e., steps off line)

_____ 6. Uses arms for balance (raises arms over six inches)

_____ 7. Loses balance while turning/turns incorrectly

_____ 8. Incorrect number of steps

Other comments: _____

☐ ONE LEG STAND:

OLS: Total number of observed clues ____

_____ 1. Sways while balancing

_____ 2. Hops

_____ 3. Puts foot down

_____ 4. Uses arms for balance (raises arms over six inches)

Other comments: _____

5. ADDITIONAL OBSERVATIONS/FACTORS: Additional facts leading me to believe that the suspect was intoxicated while operating a motor vehicle in a public place include: Blood shot / watery eyes / Slurred Speech

6. SUSPECT'S ORAL STATEMENTS: The suspect made the following statements: That he had Consumed 4 Beers.

7. OPEN CONTAINER EVIDENCE:

Open container found: YES / (NO)

List type of open container(s) found: N/A

Describe location of open container(s) found N/A

8. SUMMARY: Based upon my experiences, my training in intoxication-related offenses, and my observations of the suspect during my contact with him/her, I believe that the suspect is intoxicated by reason of the introduction of alcohol, a controlled

substance, a dangerous drug, or a combination thereof, and that the suspect lost the normal use of his/her mental or physical faculties by reason of the introduction of alcohol or one of the other aforementioned substances, or a combination thereof, into his/her body.

9. REFUSAL EVIDENCE: After placing the suspect under arrest for Driving While Intoxicated, I requested a sample of the suspect's breath and/or blood, which the suspect refused to provide a sample in violation of the Texas Implied Consent law. This is an indication to me that suspect is attempting to hide evidence of his/her intoxication. Other relevant statements made by the suspect when refusing include: N/a

10. I know from my training and experience that alcohol and other intoxicating substances are absorbed into the bloodstream of an intoxicated person and that the blood of such person can be analyzed for the presence of alcohol and other intoxicating substances.

WHEREFORE, based upon this affidavit and Beeman v. State, 86 S.W.3d 613 (Tex. Crim. App. 2002), Affiant asks for a search warrant that will authorize Affiant or Affiant's agent to search the person of the suspect for the blood evidence described above and seize the same as evidence that the offense described was committed and that the suspect committed the said offense.

Further Affiant asks for issuance of an order to appropriate third parties directing them to assist Affiant in the execution of said warrant.

Affiant

Subscribed and sworn to before me on this 9 day of July, 2016, by an official authorized to administer and authorize this oath pursuant to TEX. GOV'T CODE §602.002.

Judge / Peace Officer / Notary

ASSOCIATE JUDGE SARA JANE DEL CARMEN

Official's Printed Name & Title

THE STATE OF TEXAS §

COUNTY OF TARRANT §

## SEARCH WARRANT

The State Of Texas: To any Sheriff or any Peace Officer of Tarrant County, Texas, or any Peace Officer of the State of Texas:

Whereas, the Affiant, whose name appears on the Affidavit attached hereto is a peace officer under the laws of Texas and did heretofore this day subscribe and swear to said affidavit before me, which said Affidavit is here now made a part hereof for all purposes and incorporated herein as if written verbatim within the confines of this warrant and whereas I find that the verified facts stated by Affiant in said Affidavit show that Affiant has probable cause for the belief Affiant expresses herein and establishes the existence of proper grounds for the issuance of this Warrant:

Now, therefore, you are commanded to take custody of the suspect and transport the suspect to a physician, registered nurse, qualified technician, phlebotomist or medical laboratory technician skilled in the taking of blood from the human body, in Tarrant County, Texas, where the said physician, registered nurse, qualified technician or medical laboratory technician shall, in the presence of a law enforcement officer, take samples of the Blood from the body of the following described individual:

| | | |
|---|---|---|
| Name: Whitaker, Chase Brian | | |
| TX DL/ID # 20559505 of TXDL | | |
| Race: White | Sex: Male | DOB: 01/13/1988 |
| Height: 5'08" | Weight: 205 | Hair Color: Brown |

Law enforcement officers are authorized to use all reasonable force necessary to assist the physician, registered nurse, qualified technician, phlebotomist or medical laboratory technician to take the samples from the body suspect. After obtaining the samples of Blood, the physician, registered nurse, qualified technician, phlebotomist or medical laboratory technician shall deliver the said samples to the said law enforcement officer.

Herein fail not, but have you then and there this warrant within three days, exclusive of the day of its issuance, with your return thereon, showing how you have executed the same.

Issued on this the 9 day of July, 2016, at 3:46 AM o'clock, ___.M., to certify which witness my hand this day.

Judge, Tarrant County, Texas

THE STATE OF TEXAS §

COUNTY OF TARRANT §

**RETURN AND INVENTORY**

The undersigned Affiant, being a Peace Officer under the laws of Texas and being duly sworn, on oath certifies that the foregoing Warrant came to hand on the day it was issued and that it was executed on the 9 day of July, 2016, by making the search directed therein and seizing during such search the following described property:

Specimens of the suspect's blood.

Affiant

SUBSCRIBED AND SWORN to before me, the undersigned authority on this 9 day of July, 2016.

Judge, Tarrant County, Texas

THE STATE OF TEXAS §

COUNTY OF TARRANT §

## ORDER FOR ASSISTANCE IN EXECUTION OF SEARCH WARRANT

To any physician, registered nurse, qualified technician, phlebotomist or medical laboratory technician skilled in the taking of blood from the human body, in Tarrant County, Texas:

Whereas, the affiant whose name appears on the affidavit attached hereto is a peace officer under the laws of Texas and did heretofore this day subscribe and swear to said affidavit before me which said affidavit is here now made a part hereof for all purposes and incorporated herein as if written verbatim within the confines of this Order, and whereas I find that the verified facts stated by affiant in said Affidavit show that affiant has probable cause for the belief he/she expresses herein and establishes existence of proper grounds for issuance of a search warrant;

And whereas, this court has issued a warrant to search for and seize blood from the suspect named and described in the Affidavit, to-wit:

| | | |
|---|---|---|
| Name: Wheeler, Chase Erica | | |
| TX DL/ID # 205 [illegible] TX DL | | |
| Race: White | Sex: male | DOB: 01/13/1988 |
| Height: 5'08" | Weight: 205 | Hair Color: Brown |

THEREFORE, you are hereby ordered and commanded to cooperate with any peace officer requesting your professional assistance in the execution of this warrant. This order is directed to any individual whose aid and assistance is requested by the officer bearing the accompanying search warrant and is authorized by the full authority of this Court to issue warrants and orders to enforce the laws of the State of Texas, and Article 18.08 of the Texas Code of Criminal Procedure. *Any individual who fails to comply with this Order when requested shall be liable for contempt of this Court and subject to all penalties authorized by law.*

Ordered this the 9 day of July, 20 16 at 3:46 AM o'clock, ___.M. to certify which witness my hand this day.

Judge, Tarrant County, Texas

# App. C

## Relevant Constitutional and Statutory Provisions

> The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.

Tex. Const. art. I, § 9; *see also* Tex. Code Crim. Proc. art. 1.06 (Westlaw 2019).

> No warrant shall issue for any purpose in this state unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause does in fact exist for its issuance. A sworn affidavit setting forth substantial facts establishing probable cause shall be filed in every instance in which a search warrant is requested. …

Tex. Code Crim. Proc. art. 18.01(b) (Westlaw 2019).

> (a) No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.
> …
> (b) It is an exception to the provisions of Subsection (a) of this Article that the evidence was obtained by a law enforcement officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause.

Tex. Code Crim. Proc. art. 38.23 (Westlaw 2019).